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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NAJIB E. KHOURY, Plaintiff and Appellant, v. MOHAMMED K. AL HABTOOR, Defendant and Respondent.	G055539 (Super. Ct. No. 30-2015-00785710) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Child & Marton and Bradford T. Child for Plaintiff and Appellant.

Koorenny & Teitelbaum, Eliot L. Teitelbaum; Baker & McKenzie and Matthew Allison, for Defendant and Respondent Mohammed Al Habtoor.

* * *

Najib E. Khoury appeals from the summary judgment entered in favor of doe defendant no. 1 Mohammed K. Al Habtoor, arguing the evidence was sufficient to create a triable issue of fact on his claim that Al Habtoor intentionally subjected him to extreme emotional distress and defamed him by (1) directing his employee, Fidelio Cavalli, to make threats of death or serious bodily harm against Khoury and his family members; and (2) causing an arrest warrant to be issued against Khoury in Dubai, United Arab Emirates (UAE), based on false information.

Al Habtoor moved for summary judgment on the basis there was no evidence linking him personally to either the threatening phone calls or the arrest warrant, and on the basis Khoury had suffered no damages as a consequence of those alleged misdeeds. In granting the motion, the trial court concluded Khoury had failed to produce evidence sufficient to rebut Al Habtoor's showing that he "was not a participant" in the alleged wrongdoing.

We find no error in that ruling because while Khoury submitted evidence suggesting Al Habtoor may have employed Cavalli for some purposes, and also that Al Habtoor may have been linked to individuals who filed the criminal complaint against Khoury in the UAE, he submitted no evidence demonstrating Al Habtoor himself was responsible for either of those acts. We also conclude Al Habtoor was entitled to summary adjudication of Khoury's cause of action for intentional infliction of emotional distress because Khoury admitted he suffered no emotional distress damages as a consequence of Al Habtoor's alleged acts. Khoury conceded the point in his response to form interrogatories; he cannot thereafter create a triable issue by attempting to withdraw this concession in his opposition to the motion for summary judgment.

Finally, we find no error in the court's denial of the new trial motion. While the newly discovered evidence was sufficient to create a triable issue of fact regarding Al Habtoor's responsibility for the threatening phone calls (although not for the issuance of the improper arrest warrant), it did nothing to cure the fatal defect in

Khoury's attempt to prove that he had incurred emotional distress as a consequence of those calls. Thus, the evidence presented in support of the new trial motion was not material.

The judgment is affirmed.

FACTS

Khoury filed his initial complaint against Cavalli, Al Habtoor's father, Khalaf Ahmad Al Habtoor,[1] and an entity called the Al Habtoor Group LLC. He subsequently amended the complaint, substituting Al Habtoor as a defendant in place of the fictitiously named Doe 1.

Khoury alleged causes of action for intentional infliction of emotional distress and defamation, arising out of actions taken in response to Khoury's alleged effort to inform the Al Habtoors that Cavalli, whom Khoury believed to be their employee, may have been involved in chartering a plane that was seized and found to contain illegal drugs.

Khoury alleged that the day after he met with Al Habtoor's father in November 2013, to share his information regarding Cavalli's possible connection with the chartered plane, he received two recorded telephone messages from Cavalli. Although both were in Arabic, he alleged the first message when translated was: "Najib, you son of a whore. You have accomplished nothing. I will fuck you up and your mother. I will fuck you up and your sister, you son of a whore. (Spitting) Wait till I cross path and see you and I will fuck you up (kill), and your sister, you son of a whore. Just wait till I see you." The second message was allegedly briefer: "Najib, this is Fidel.

[1] Khalaf Ahmad Al Habtoor is not involved in either this appeal or the summary judgment that gave rise to it. Consequently, all references to "Al Habtoor" individually are references to Mohammed K. Al Habtoor.

You have accomplished nothing. I and Dori are clean men. Fuck you and the FBI, CIA, and Interpol."

Khoury alleged that Al Habtoor and his father had directed Cavalli to make the threatening calls, and that as a consequence of the calls, he feared for his life and for the lives of his family members. He therefore immediately left Dubai.

Upon Khoury's return to the United States, with the assistance of counsel, he reached out to authorities in Dubai to request that they investigate the matter. He also filed this lawsuit.

Roughly six months after Khoury filed this lawsuit, the defendants allegedly retaliated against him by filing a false criminal complaint against him in Dubai, causing a warrant for his arrest to be issued.

Khoury alleged that both the threatening phone messages and the false criminal complaint gave rise to his cause of action for intentional infliction of emotional distress, and that his cause of action for defamation was based on the filing of the false criminal complaint.

Al Habtoor moved for summary judgment, or alternatively for summary adjudication of the two causes of action, asserting (1) he had no connection to either the threatening phone calls or the criminal complaint filed against Khoury in the UAE, and (2) Khoury had suffered no damages as a consequence of the threats and arrest warrant alleged in his complaint.

In support of the first assertion, Al Habtoor submitted his own declaration in which he denied employing Cavalli; instead he described Cavalli as his "personal friend." He also denied directing or instructing Cavalli to call Khoury or threaten him in any way, denied being present when Cavalli left the messages described in the amended complaint, and denied knowing anything about the alleged messages until after Khoury filed his lawsuit. Al Habtoor also denied making any criminal complaint to the Dubai

police concerning Khoury or having any communications with the Dubai police or any other criminal investigators about Khoury.

Al Habtoor also submitted a declaration from Cavalli, in which Cavalli acknowledged making the phone calls to Khoury but stated he did not intend to threaten him. Cavalli also denied that he had been directed by Al Habtoor to make the calls, claiming he made the calls "because [he] was upset at the false claims that [Khoury] was making about [him]."

As to the second point, Al Habtoor relied on Khoury's discovery responses, including responses to requests for production of documents in which Khoury stated he had no documents "evidencing, relating to, or supporting" his allegations that he suffered damages, loss of health, loss of income, employment and career benefits, or was suffering from severe and enduring emotional distress. Al Habtoor also relied on Khoury's response to form interrogatory No. 6.1, which asked: "Do you attribute any physical, mental or emotional injuries to the Incident?"[2] Khoury's response was "No."

In his separate statement of undisputed facts in support of summary judgment, Al Habtoor asserted it was undisputed that "Khoury does not attribute any physical, mental or emotional injuries to the Incident," relying on Khoury's interrogatory response.

In support of his opposition to the motion, Khoury submitted his own declaration, in which he stated, among other things, that Al Habtoor's father "acknowledged that Cavalli works for him and his son . . . ." and that Cavalli has also "confirmed [that] through his Instagram posts, where he consistently refers to Mohammed [Al Habtoor] as his 'boss'." Khoury also declared that the two threatening phone calls from Cavalli "originated from a telephone number located in the residence of

[2] For purposes of the form interrogatories, the term "Incident" was defined as "The allegations set forth in Plaintiff's First Amended Complaint in this action."

Mohammed [Al Habtoor], in Jumeirah, Dubai," although he offered no foundation for this belief.

Khoury further declared that he believed Cavalli's threats to be credible because the Al Habtoors "control the government and police" in Dubai, and he "know[s] from personal experience and news articles that Dubai is a country where the rich and powerful can do as they please with little to no consequences."

Finally, Khoury declared that "[d]ue to the criminal threats against me, the criminal warrant against me, and the fact that I cannot travel to the Middle East anymore, I have severe anxiety, paranoia, and stress. I also suffer from sleeplessness and nervousness. I served amended responses to Form Interrogatories 6.1 confirming the same."[3]

Khoury also presented declarations from three other witnesses, one of whom declared that Cavalli had told him "on several occasions" that he was employed by Al Habtoor and that he does "whatever [Al Habtoor] needs him to do." Another declarant stated that he introduced Cavalli to Al Habtoor in 2007 or 2008; that he thereafter arranged for Cavalli to act as Al Habtoor's "driver and tour guide" during a visit to the United States; and that Al Habtoor referred to Cavalli as his "'employee'" during their conversation in 2009. The third declarant stated he was present at the 2013 meeting with Khoury and Al Habtoor's father and stated that Al Habtoor's father confirmed Cavalli worked for him and his family.

[3] Khoury's amended response to form interrogatory No. 6.1—in which he purports to change his response to the question of whether he attributed emotional injury to the events alleged in the first amended complaint from "No" to "Yes"—is unverified. The proof of service reflects it was served on Al Habtoor two months after Al Habtoor filed his motion for summary judgment, and only six days before Khoury served his opposition to such motion.

Al Habtoor filed detailed objections to all of the declarations filed in support of Khoury's opposition to the summary judgment motion, arguing the facts stated in the declarations were conclusory, speculative, lacking in foundation, and hearsay.

Khoury's response to Al Habtoor's separate statement of undisputed facts relied upon these declarations as the basis for disputing Al Habtoor's contentions that he did not employ Cavalli and did not direct him to threaten Khoury in any way, and that he did not make any criminal complaint against Khoury to the Dubai police or any other police and had no communications with the police about Khoury.

Khoury did not directly dispute Al Habtoor's assertion, based on Khoury's response to form interrogatory No. 6.1, that "Khoury does not attribute any physical, mental or emotional injuries to the Incident." Instead, Khoury responded that the alleged undisputed fact was "[d]isputed as irrelevant," while citing the paragraph of his declaration in which he described his emotional distress and stating he had provided "amended responses" to form interrogatory No. 6.1.

The trial court granted summary judgment, explaining that "Mohammad Al Habtoor has met his burden of showing that he has a complete defense to plaintiff's first and second causes of action for infliction of emotional distress and defamation in that he has brought forth a prima facie case that he was not a participant in the actions which are the basis of said causes of action. The burden thus shifted to plaintiff to show a triable issue of material fact as to said elements of his causes of action and the court finds that plaintiff has failed to meet that burden."

Thereafter, Khoury moved for a new trial based on newly discovered evidence. He supported his motion with declarations from Khalil Milan and Wael Azim. Milan declared that he was friends with both Khoury and Azim, and that in April 2017, he informed Azim that Khoury's lawsuit against Al Habtoor had been dismissed because Khoury was unable to prove Al Habtoor was responsible for the death threats and the issuance of the arrest warrant. Milan stated that Azim said he had information pertaining

to the case that he wanted to share with Khoury. Milan then recalled that Azim said "he was threatened by [Al Habtoor] and Cavalli to stay away from the case and that he did not want to get involved with this lawsuit out of fear for his safety and his family's safety."

In his declaration, Azim does not initially explain his reason for not coming forward earlier. However, Azim does declare that he has known Al Habtoor for about 15 years, and sees him regularly when Al Habtoor visits Las Vegas, where Azim lives. He also declares that during a visit in March 2014, Al Habtoor "started telling me how angry he was regarding Mr. Khoury's statements about Fidelio Cavalli's involvement with the charter of a jet that was hijacked." Azim states that "Mohammed Al Habtoor told me that after he heard about Mr. Khoury's statements, he instructed Cavalli to make a threatening phone call to Najib Khoury to stop Mr. Khoury from spreading information about Cavalli' s involvement with the charter."

Azim further declares that "Approximately eight months ago, I met with Fidelio Cavalli when he was in Las Vegas. Because he knows . . . that I know Najib Khoury, he was telling me about how Mohammed had gotten Najib back for filing a lawsuit against them. Mr. Cavalli told me that Mohammed had the Dubai Police to issue a warrant for Najib Khoury's arrest and that Moh[a]mmed had arranged for Najib Khoury to be arrested the next time he travelled to the Gulf Coast Countries."

In a supplemental declaration, Azim explains his reason for not coming forward earlier. He declares that during the same conversation in which Cavalli had revealed to him that Al Habtoor was behind the issuance of the arrest warrant against Khoury, he also "told me that Mohammed was very powerful and can cause me and my family many problems. Cavalli told me to 'stay the fuck away' from this lawsuit and Khoury in general. Cavalli threatened that I had family in Egypt and Dubai that I would want to keep safe, hinting that Mohammed can use his influence and power to inflict harm upon them. Cavalli also said that he could 'fuck me up' and 'fuck Khoury up.'"

Azim explained that he had initially assumed Khoury would win his lawsuit without Azim's information, but when he learned the lawsuit had been dismissed, he "decided to finally confess to Khoury my knowledge concerning [Al Habtoor's] involvement with the threats and arrest warrant" because he "could no longer in good conscience stand by without doing anything."

The trial court set a hearing on the motion for new trial to consider this new evidence. At that hearing, the court denied the motion, stating the new evidence was largely comprised of inadmissible hearsay. The court also found the declarations largely lacked foundation: "Much, I would say the vast part, of Mr. Azim's testimony also suffers from that lack of foundation . . . . In paragraph 4 of his declaration he testifies as to the knowledge of other people. Mr. Al Habtoor and Mr. Cavalli, both of them, says Mr. Azim, both of them he says are, quote, aware that he himself is also, quote, aware of what he calls, quote, the incident, quote, involving Mr. Khoury in Dubai. [¶] Now, this is a time to be specific. It's not a time to be general about one person being aware of what another person is aware of concerning an unspecific incident of an unspecific date in Dubai or anywhere else. [¶] Mr. Azim does not identify the source of either his or these other two witnesses, quote, awareness. It sounds a lot like mind reading. . . . I don't think I have to accept simple awareness as evidence, not without some admissible foundation."

When Khoury's counsel pointed specifically to the portion of Azim's declaration relating that Al Habtoor told him he instructed Cavalli to make a threatening phone call to Khoury to "stop [him] from spreading information about Cavalli' s involvement with the charter," the court dismissed that evidence as insignificant. The court noted Azim's declaration was nonspecific and conclusory on several points, and did not reveal "the content" of what Al Habtoor had directed Cavalli to say. The court refused to "read tea leaves . . . about what [Azim] was specifically told on this date about things that happened over a period of years . . . ."

DISCUSSION

1. *Standards Applicable to Summary Judgment*

"A motion for summary judgment should be granted if the submitted papers show that 'there is no triable issue as to any material fact,' and that the moving party is entitled to judgment as a matter of law. [Citation.] A defendant moving for summary judgment meets his burden of showing that a cause of action has no merit if he shows that one or more elements of the cause of action cannot be established, or that there is a complete defense. [Citation.] Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists." (*Myers v. Trendwest Resorts, Inc*. (2007) 148 Cal.App.4th 1403, 1409.)

"There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. Initially, the moving party bears a burden of production to make a prima facie showing of the nonexistence of any genuine issue of material fact. If he carries his burden of production, he causes a shift: the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a genuine issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.)

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) "In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

Moreover, under this de novo standard, "the trial court's stated reasons for granting summary judgment 'are not binding on us because we review its ruling, not its rationale.'" (*Johnson v. Open Door Community Health Centers* (2017) 15 Cal.App.5th 153, 157.) We will affirm the summary judgment ruling if it is correct based on any of the grounds asserted in the motion. (*American Meat Institute v. Leeman* (2009) 180 Cal.App.4th 728, 747-748.)

2. *Sufficiency of Khoury's Evidence in Opposing Summary Judgment*

The trial court granted summary judgment on the basis Khoury failed to present sufficient evidence to create a triable issue of fact on his assertion that Al Habtoor was responsible for Cavalli's threatening phone calls or for the filing of the criminal complaint against him in Dubai.

According to Khoury, that ruling was erroneous because he provided "circumstantial" evidence of Al Habtoor's direct involvement in the threatening phone calls by showing that the calls were made very shortly after he revealed to Al Habtoor's father that Al Habtoor "may have been indirectly involved with drug smugglers" and that the calls specifically referenced details Khoury had revealed during that meeting. We cannot agree. While the evidence Khoury points to does suggest a causal link between his meeting with Al Habtoor's father and Cavalli's threatening phone calls, it does not link Al Habtoor to any misconduct.

A reasonable conclusion to be drawn from the evidence is that, as Cavalli himself expressly declared to be the case, Cavalli chose to make the threatening calls of his own volition after he learned Khoury had linked him directly to the alleged drug smuggling. There is no evidence, beyond speculation, to suggest that anyone else might have directed Cavalli to make those calls. "[A]n issue of fact can only be created by a conflict of evidence. It is not created by speculation or conjecture." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.)

Khoury claims the court erred by treating the statements made by Cavalli and Al Habtoor as inadmissible hearsay because they qualified as "admissions of a party" under Evidence Code section 1220. That section only allows the admission of a statement against the party who made it—not against other parties.[4] Consequently, any hearsay statements attributable to Cavalli or Al Habtoor's father, rather than to Al Habtoor himself, remained inadmissible for purposes of this summary judgment motion. The only hearsay statement attributed to Al Habtoor himself was his statement referring to Cavalli as his employee *in 2009*; i.e., five years before Cavalli made the threatening phone calls alleged in the amended complaint. That evidence is insufficient, as a matter of law, to demonstrate that Al Habtoor was Cavalli's employer at the time he made the phone calls. It does not support the assertion Al Habtoor was responsible for those calls.

Khoury also contends the evidence was sufficient to create a triable issue of fact about whether Al Habtoor was vicariously liable for Cavalli's threatening phone calls. Again we disagree. As we have already explained, there was no admissible evidence that Cavalli was Al Habtoor's employee when he made the calls, and thus no basis for holding him vicariously liable on either a theory of respondeat superior or a theory of ratification.

Finally, Khoury argues there was sufficient evidence to create a triable issue of fact as to Al Habtoor's responsibility for filing the criminal complaint against him in the UAE because it was filed in the wake of Khoury's initiation of this lawsuit, and the criminal arrest warrant issued against him reflects it is based on allegations that Khoury engaged in blackmail "against Mohammad [Al Habtoor] and the company for which [he] is the CEO."

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[4] Evidence Code section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

However, even if we assume the criminal warrant was admissible as a public record under Evidence Code section 1280—and Khoury has made no such showing—it would still not be admissible to prove the truth of factual statements made therein. (See *People v. Sanchez* (2016) 63 Cal.4th 665, 694-695 [discussing the inadmissibility of "testimonial" documents such as police reports].) Thus, Khoury cannot rely on the facts set forth in the UAE criminal warrant to demonstrate the truth of those facts. And even if it were appropriate to rely on the truth of the facts set forth in that criminal warrant, it would not assist Khoury here. As Al Habtoor points out, the criminal warrant itself (as translated) reflects the complaint was filed by an attorney at the behest of Al Habtoor's father, not by Al Habtoor himself, based on allegations that Khoury had "exposed [Al Habtoor's father] to slander and threat" by notifying third parties that his son was involved with an "ill reputed person named Caval[l]i."

3. *Sufficiency of Khoury's Evidence of Emotional Distress*

Even if we agreed with Khoury's assertion that there was sufficient evidence to create a triable issue of fact about Al Habtoor's responsibility for the threatening phone calls and the criminal complaint filed against Khoury in the UAE, we would nonetheless affirm the trial court's order summarily adjudicating the cause of action for intentional infliction of emotional distress against him.[5]

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[5] Code of Civil Procedure section 437c, subdivision (m)(2), states in pertinent part that "[b]efore a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs." However, supplemental briefs are not warranted in this case as both parties have already presented their views on the issue of whether Khoury had produced sufficient evidence of damages in their initial briefs. (See *Bains v. Moores* (2009) 172 Cal.App.4th 445, 471, fn. 39 ["supplemental briefing was not required in this case because the parties have already been provided 'an opportunity to present their views on the issue.' [Citation] Defendants directly addressed the issue in their briefs, and plaintiffs addressed it in their reply brief. The purpose of section 437c, subdivision (m)(2) has thus been fully met"]; *Byars v. SCME Mortgage Bankers, Inc.*

As discussed above, Khoury answered a form interrogatory asking if he attributed any "emotional injury" to the events alleged in the first amended complaint with an unequivocal "No." And, although Khoury supplemented his responses to those form interrogatories in January 2017—just before Al Habtoor filed his summary judgment motion—he made no effort to supplement or amend his response to the question asking about emotional injury at that time.

Hence, Al Habtoor relied upon Khoury's response to the form interrogatory to demonstrate, as an undisputed fact supporting summary judgment, that Khoury had suffered no emotional distress as a consequence of the wrongful acts allegedly committed by Al Habtoor.

Less than a week before he served his opposition to Al Habtoor's summary judgment motion, Khoury served, without explanation, an "amended response" to the form interrogatories, in which he changed his "No" response to the emotional distress question to "Yes." Additionally, Khoury declared he had suffered "severe anxiety, paranoia, and stress" as well as "sleeplessness and nervousness" as a consequence of Al Habtoor's alleged wrongdoing.

It is well-settled that a party cannot avoid summary judgment by contradicting his own discovery responses. As explained in *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22 (*D'Amico*), "admissions against interest have a very high credibility value. This is especially true when, as in this case, the admission is obtained not in the normal course of human activities and affairs but in the context of an established pretrial procedure whose purpose is to elicit facts. Accordingly, when such an admission becomes relevant to the determination, on motion for summary judgment, of whether or not there exist triable issues of *fact* (as opposed to legal issues) between the parties, it is entitled to and should receive a kind of deference not normally accorded

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(2003) 109 Cal.App.4th 1134, 1147, fn. 7.)

evidentiary allegations in affidavits." Thus, where the responding party makes "'a clear and unequivocal admission [in discovery]'" and then contradicts that admission in a subsequent declaration, "'we are forced to conclude there is no *substantial* evidence of the existence of a triable issue of fact.'" (*Id*. at p. 21.)

In *Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 145, the court noted the *D'Amico* rule does not apply when a party has submitted "factually devoid" or "evasive" responses to discovery, and does not preclude a party from offering additional evidence to prove his initial discovery responses were the product of a mistake. In the latter case, the additional evidence would create a triable issue of fact as to "whether, in light of *all the evidence adduced on the motion*, a reasonable trier of fact could conclude that [the responding party's] initial discovery responses were a mistake and that the contradictory statements in [his] declaration were credible." (*Id*. at p. 146; see Code Civ. Proc., § 2030.310, subd. (a) [allowing a party to serve an amended answer to an interrogatory with "information subsequently discovered, inadvertently omitted, or mistakenly stated in the initial interrogatory"].)

In this case, however, Khoury offered no evidence explaining the circumstances surrounding his initial response to Al Habtoor's form interrogatory regarding emotional distress, or why his initial response should be viewed as the product of mistake. Nor does he explain why, when he supplemented his responses to the form interrogatories just before Al Habtoor filed his motion for summary judgment, he did not alter his initial denial of emotional injury at that time. Instead, Khoury seems to suggest that because he has now contradicted his initial answer, by submitting a declaration claiming emotional distress, we should ignore the "No" answer. We cannot do so without violating the *D'Amico* rule.

On appeal, Khoury does not acknowledge the problem created by his denial of emotional injury. Rather, he implies it is irrelevant because he can prevail on a cause of action for intentional infliction of emotional distress without proving "economic

damages." That is true. But as Khoury also acknowledges, the reason it is true is because "[i]n an action for intentional infliction of emotional distress, the emotional distress *is* . . . the plaintiff's *actual damage*." (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 406.) It is the existence of that emotional distress which Khoury has unequivocally denied in his interrogatory response. As a consequence, his cause of action for emotional distress must fail.

We find no error in the trial court's grant of summary adjudication of that cause of action.

4. *The Denial of the Motion for New Trial*

Finally, Khoury claims the trial court erred by denying his motion for new trial based on newly discovered evidence. Although we disagree with the reasoning employed by the trial court in denying the motion, we find no error in its ruling.

To justify a new trial based on newly discovered evidence, three things must be proven: (1) the evidence is newly discovered; (2) the evidence could not have been discovered and produced at trial with reasonable diligence; and (3) the evidence is material to the moving party's case. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160-1161 (*Sherman*).)

Although we generally defer to the trial court's discretion in deciding whether to grant a new trial, when our review is from an "'order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial.'" (*Sherman, supra,* 67 Cal.App.4th at pp. 1161-1162*; see City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872 [applying rule in determining whether attorney misconduct during trial was prejudicial, thus warranting a new trial]).

In support of his new trial motion, Khoury presented the court with Azim's declaration stating, among other things, that in March 2014, Al Habtoor told him "how angry he was regarding Mr. Khoury's statements about Fidelio Cavalli's involvement with the charter of a jet that was highjacked" and that "after he heard about Mr. Khoury's statements, he instructed Cavalli to make a threatening phone call to Najib Khoury to stop [him] from spreading information about Cavalli's involvement with the charter."

Azim also declared that Cavalli had told him Al Habtoor "had gotten [Khoury] back for filing a lawsuit against them." Specifically, Azim declared Cavalli told him that Al Habtoor "had the Dubai Police . . . issue a warrant for Najib Khoury's arrest and that [Al Habtoor] had arranged for Najib Khoury to be arrested the next time he travelled to the Gulf Coast Countries."

"Whether or not a reasonable effort was made to discover the evidence is an issue best left to the trial court, and we will not disturb its findings without a clear showing that the court abused its discretion." (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 731.) Although the trial court did not directly address the issue of Khoury's diligence in producing the new evidence, we infer it concluded Khoury had acted with sufficient diligence.

We find no error regarding that conclusion. Khoury declared that although he had no reason to believe that Azim would be especially helpful as a witness, he did reach out to him earlier in the case and Azim was not able to provide him with any information. Azim himself declared that he had been unwilling to share his knowledge about Al Habtoor before Khoury's case was dismissed because he feared retaliation. Azim explained he had believed Khoury would win his case without Azim's involvement and that he only decided to come forward after learning of the dismissal. That evidence was uncontradicted and supported a finding that Khoury's late discovery of this evidence was not attributable to any lack of diligence.

The trial court nonetheless denied the new trial motion, concluding the new evidence was not material. We agree with the trial court's ruling that Azim's declaration regarding Al Habtoor and Cavalli's "awareness" was lacking in foundation and inadmissible. But, despite these flaws in Azim's declaration, it nevertheless does provide admissible evidence that in March of 2014 (i.e., four months after Cavalli made the allegedly threatening phone calls to Khoury), Al Habtoor personally admitted he had "instructed Cavalli to make a threatening phone call to . . . Khoury to stop [him] from spreading information about Cavalli's involvement with the charter." That evidence was close in time to the phone calls alleged in the amended complaint and specific about the subject of the threat. It consequently supported the conclusion that Al Habtoor was responsible for the alleged phone calls, and therefore was admissible against him under Evidence Code section 1220. That new evidence created a triable issue of fact as to whether Al Habtoor was liable for whatever emotional distress Khoury suffered as a consequence of those threatening phone calls.

Nonetheless, as discussed above, there still remained "no triable issue of fact" as to the cause of action regarding whether Khoury suffered emotional distress. The new evidence submitted by Khoury in support of his new trial motion, therefore, did not warrant a new trial. We find no error in the trial court's denial of that motion.

DISPOSITION

The judgment is affirmed. Al Habtoor is to recover his costs on appeal.

GOETHALS, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.